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Supreme Court of the United States.

No. 4 Original, October Term, 1882.

Ex Parte, THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner.

Application for a Writ of Mandamus.

BRIEF FOR RELATOR.

JOHN H. B. LATROBE,
JOHN K. COWEN,
E. J. D. CROSS,
Of Counsel for Relator.

ISAAC FRIEDENWALD, PRINT., BALTIMORE.

Supreme Court of the United States.

No. 4 Originals, October Term, 1882.

Ex Parte, THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner.

APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR RELATOR.

The petition filed by the relator states that on the 20th day of April, 1881, Jeanette Maxon, as owner of a certain barge called "J. J. Munger," and Wm. M. Force and others, as owners of a cargo of corn on board said barge, exhibited in the District Court of the United States for the District of Maryland, their joint libel against the Baltimore and Ohio Railroad Company in a cause of collision, civil and maritime.

Libellants alleged that on March 22d, 1881, said barge, loaded with a cargo of corn, while in the harbor of Baltimore, and lying at a certain wharf, was injured by a steamer called "The Knickerbocker," then in the employ of the Railroad Company.

The libellants alleged also that the collision was the result of negligence on the part of the steamer, or those having the control thereof; and prayed that a decree be entered by the District Court for the amount of $6000, the damages alleged to have been suffered by them by reason of the collision.

The Railroad Company filed its answer, denying that the collision was the result of negligence on the part of the steamer. Proof was taken, and on June 24th, 1881, the Hon. Thomas J. Morris, Judge of the District Court, rendered a decree in favor of the libellants against the Railroad Company to the amount of $1471.20 in favor of Jeanette Maxon, and in favor of Wm. M. Force and others in the sum of $3907.13 with interest. From this decree an appeal was taken to the Circuit Court of the United States for the District of Maryland, where the decree of the District Court was affirmed.

An appeal was prayed to this Court on March 3d, 1882, and refused on March 22d, 1882.

The Railroad Company then filed its petition in this Court, praying that a rule might be laid upon the Hons. Hugh L. Bond and Thomas J. Morris, the Judges of the Circuit Court, requiring them to show cause why a mandamus should not issue requiring them to allow an appeal in said cause.

The decree from which the appeal is prayed, and the order of Court thereon, are filed with the petition (pp. 5, 7).

Counsel for the relator respectfully submit that the writ of mandamus should be allowed.

The statute granting appeals is as follows:

> An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court . . . . . where the matter in dispute

exceeds the sum or value of two thousand dollars; and the Supreme Court is required to receive, hear and determine such appeals.

Revised Statutes, sec. 692.

By Act of February 16, 1875, this amount was changed to five thousand dollars.

Sup. to Rev. Statutes, p. 136.

The decree from which appeal was prayed was that the Railroad Company should pay to Jeanette Maxon $1471.20, to Wm. M. Force and others, trading as J. & C. Moore & Co., $3907.13, each sum being less than the jurisdictional amount, but aggregating $5378.33.

The sole question then is: Does the matter in dispute, as far as the relator is concerned, exceed the sum or value of $5000?

The matter in dispute is the subject in litigation or controversy. In the proceedings in the District Court the libellants sought to hold the railroad company responsible in a certain sum. As far as they were concerned, the sum which each claimed was the matter in dispute as to them. Should they, or either of them, have prayed an appeal, the test of jurisdiction would be the amount each claimed. They were concerned or interested in the controversy to that amount.

When the defendant prayed an appeal, the *matter in dispute*, as to it, was as to amount, the sum it was decreed to pay. To this extent it was interested in the litigation. liability under the decree passed against it is what it ks the revisory action of this Court upon; that liability is what it was decreed to pay, viz. $5378.33.

Does the fact that the decree was that the defendant ould pay $1471.20 to Jeanette Maxon, and $3907.13 to e firm of J. & C. Moore & Co., make the matter in dispute

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When the defendant prayed an appeal, the *matter in dispute*, as to it, was as to amount, the sum it was decreed to pay. To this extent it was interested in the litigation. Its liability under the decree passed against it is what it seeks the revisory action of this Court upon; that liability was what it was decreed to pay, viz. $5378.33.

Does the fact that the decree was that the defendant should pay $1471.20 to Jeanette Maxon, and $3907.13 to the firm of J. & C. Moore & Co., make the matter in dispute

× The matter in dispute, was not the amount due each claimant, but rather the act which made the company liable to both – the collision – this was common to both, and it made no difference how the libellants apportioned the damages.

as far as the defendant is concerned any other than the sum of $5378.33? Is not this sum the measure of its interest in the controversy? It disputes the decree as an entirety. It is interested in the controversy to this extent. Does it not therefore come within the terms of the statute?

The amount of the single claim of either of the complainants is not the matter in dispute from the standpoint of the defendant, but the claims of both as ascertained and settled by the decree.

The decisions of this Court upon this subject naturally divide into two classes, according to the attitude of suitors who are appellants.

The *first* class is composed of appellants whose claims or liabilities singly do not equal the jurisdictional amount, yet when aggregated exceed it. The uniform decision of this Court has been that an appeal will not lie, for the reasons that the matter in dispute is confined to the claim of each appellant, is distinct and cannot be consolidated with the demands of others. The cases most frequent have been seamen claiming wages, salvors for salvage, and creditors with distinct claims against a fund or party. The principal cases upon this class are:

Stratton *vs.* Jarvis & Brown, 8 Peters, 8.
Rich *vs.* Lambert, 12 Howard, 347.
Seaver *vs.* Bigelow, 5 Wall. 208.
Terry *vs.* Hatch, 93 U. S. 44.
Paving Co. *vs.* Mulford, 100 U. S. 147.
Chatfield *vs.* Boyle, Oct. T. 1881.

The *second* class is composed of defendants who have been sued by parties whose claims singly do not equal the jurisdictional amount, yet when a decree has been rendered awarding to complainants sums collectively equal to the jurisdictional amount, it has been held that an appeal will lie.

In the case of Shields *vs.* Thomas, 17 How. 3, Chief-Justice Taney draws this distinction. The bill was filed by certain distributees of an estate to recover sums alleged to be due them. The sum allotted to each party was less than $2000, but the decree in favor of complainants was for a greater sum. The motion to dismiss was upon the ground that the sum due to each complainant was severally and distinctly decreed to him, and that the amount thus decreed was the sum in controversy between each representative and the appellant, and not the whole amount for which he had been held liable. But the Court held that:

> So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds two thousand dollars. We think the Court, therefore, has jurisdiction on appeal.

In the case of Paving Co. *vs.* Mulford, 100 U. S. 147, the judgment could only have been several against each defendant. The Chief Justice states the general doctrine to be:

> In such cases the appeal of each defendant must stand or fall according as his own interest exceeds or falls short of our jurisdictional amount.

In the case of Market Co. *vs.* Hoffman, 101 U. S. 112, the bill was originally filed by Hoffman against the Market Company, praying that the Company should be enjoined from selling the complainant's butcher stall. A large number of parties claiming to be entitled to other stalls were subsequently made parties complainant. The court below passed a decree which enjoined the Company from selling the stalls. Upon the question of jurisdiction the Court held:

> The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the Company, the case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all, and in denial of the right claimed by the Company, which is of far greater value than the sum which by the Act of Congress is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the Company proposed to make, and the court enjoined, would have realized to the Company more than $60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction.

To the same effect is the case of Corbin *vs.* County of Black Hawk, October Term, 1881. The bill was filed by Corbin against the County, its Auditor and Treasurer, and a number of individuals, for the specific performance of contracts of sale of school lands. Mr. Justice Blatchford, in delivering the opinion, says:

> The first point taken by the appellees is that the appeal ought to be dismissed for want of jurisdiction in this Court, on the ground that the matter in dispute does not exceed the sum or value of $5000, exclusive of costs. The view urged is, that the interest of each of the appellees, who is alleged to have an interest in some of the lands in question, is several; that each several interest is not shown to exceed the value of $5000, and that the county of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the Governor of the State, the notes and amounts due thereon are held by the county. The money is to be paid to the county, and the tender was made to the officers of the county, who are defendants. The matter in dis-

pute between the appellant and the county is the sum of $16,197.69, which he tendered to its officers, and which they did not accept. Under the contracts the purchaser is entitled to receive a patent from the Governor only on paying the notes which are alleged to be held by the county. To obtain the relief asked for in the bill, the plaintiff must first pay the said sum to the county in discharge of said notes. His title cannot be quieted as prayed for as against the adverse claimants of the land until his contract obligations to the county are fulfilled. Therefore, the county and its said officers are real parties, and the matter in dispute as to them is the sum so tendered.

We submit that the decision of this Court, rendered at the last term on the motion to dismiss the appeal in the case of "The Mamie," or as entitled on the docket, *Parcher et al. vs. Cuddy*, No. 1114, is conclusive of the present question. There the liability sought to be enforced against *Parcher et al.* as owners of the yacht Mamie, was the claims of a number of parties who each claimed $5000. Each single claim could not give jurisdiction, but collectively they would. The Chief Justice held that the matter in dispute was the "full amount of all the claims against the owners of the Mamie in the several suits which it was the object of this proceeding to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of $5000."

Phillips' Practice, (ed. 1878) p. 93.
Rodd vs. Heart, 17 Wall. 355.

In the case of Oliver vs. Alexander *et al.*, 6 Pet. 143, the appeal was from *separate* and *several* decrees under separate libels awarding various sums to seamen for wages. The Court held the claims to be separate and distinct, and that there could only be an appeal from a decree for a sum under the jurisdictional amount.

JOHN H. B. LATROBE,
JOHN K. COWEN,
E. J. D. CROSS,
of Counsel for Relator.

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16-5-

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1882.

EX-PARTE THE BALTIMORE AND OHIO RAILROAD COMPANY.

PETITION FOR A RULE FOR A MANDAMUS.

JOHN K. COWEN,

Of Counsel for Petitioner.

THE SUN JOB PRINT, BALT.

IN THE

Supreme Court of the United States.

EX-PARTE, THE BALTIMORE AND OHIO RAILROAD COMPANY.

PETITION FOR A RULE FOR A MANDAMUS.

To the Honorable, the Judges of the Supreme Court of the United States.

The Baltimore and Ohio Railroad Company, a body corporate of the State of Maryland, by John K. Cowen, its attorney, moves the court for a rule upon the Honorable Hugh L. Bond and Robert W. Hughes, Judges of the Circuit Court for the Western District of Virginia, to show cause why a writ, commonly called a writ of mandamus, should not be issued out of the office of the Supreme Court of the United States commanding them to hear and determine a certain suit brought by the petitioner against one John E. Hamilton to recover the possession of certain personal property belonging to the petitioner, and also to strike from the record a certain order made by said Circuit Court in said cause on the 4th day of April, 1883, whereby the writ and the service thereof in the said suit was quashed, and thereupon to make such order or disposition of the said suit as ought to have been made had the said order to quash the writ and the service thereof not been made.

In order that this Honorable Court may be advised of the circumstances under which this mandamus is prayed, the petitioner presents the following

STATEMENT OF FACTS

as they appear in said cause, as shown by the certified copy of the record hereto attached and made a part of the petition.

On the 29th day of March, 1883, your petitioner filed in said Circuit Court, a declaration in an action of replevin for the recovery of certain personal property, particularly described in said declaration, and gave a bond in the penal sum of seventeen thousand dollars, approved by the clerk of the said court in the manner required by law, all of which appear in the record aforesaid, and on the day aforesaid, a writ of replevin and summons was issued and served upon the defendant in said suit, John E. Hamilton, and the writ of replevin was executed by the Marshal of said Circuit Court by said Marshal's taking said property from said John E. Hamilton, and delivering the same to your petitioner upon the execution of the bond aforesaid.

Your petitioner avers that said property at the time of said suit, had been wrongfully taken from your petitioner by said John E. Hamilton, and that said suit or action of replevin was brought for the purpose of recovering the possession of said specific property, and damages for its wrongful detention.

On the 4th day of April, 1883, John E. Hamilton, by his attorneys, filed a motion in said court, to quash the writ of replevin, which had been issued in said suit and the service thereof, as will appear from the record aforesaid; and afterwards, to wit: upon the 4th day of April, 1883, the said court, being of opinion that it had no jurisdiction to issue the writ of replevin, and being of opinion that no action of replevin could be brought in Virginia for the recovery of the possession of personal property which had been wrongfully taken, ordered the said writ and the service of the same to be quashed.

Your petitioner further sets forth, that the code of Virginia of 1873, chapter 145, section 4, provides as follows:

"No action of replevin shall be brought after the commencement of this chapter, except for a cause of action which arose before such commencement, and for which it was capable of being brought at the time the same arose."

The said Circuit Court were of the opinion that because said section 4 of chapter 145 of the Code of Virginia had abolished the action of replevin, therefore no action of replevin could be brought in the United States Circuit Court for the Western District of Virginia. Said Circuit Court was of the opinion that no action of replevin could be brought in said Circuit Court, since the abolition of the action of replevin by said section of the Code of Virginia, because section 914 of the Revised Statutes of the United States prescribes that "the practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Courts shall conform as near as may be to the practice, pleading and forms and mode of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule to the contrary notwithstanding."

Your petitioner further states, that under the laws of Virginia, there is no form of action provided for the recovery of the possession of personal property, wrongfully taken, and no form of action provided to take the place of the old action of replevin. Under the law of Virginia, regulating the forms of action or proceeding for the enforcement of rights, there is no form of action or remedy provided, whereby, your petitioner can recover possession of the specific personal property which the defendant Hamilton has wrongfully taken from your petitioner.

Your petitioner is therefore, by order of said court, prevented from exercising its right to sue the defendant, Hamilton, in the manner it is advised, it is entitled to do by the Act of Congress conferring upon the United States Circuit Courts jurisdiction of all suits of a civil nature at common law, where the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars; where the suit is between a citizen of the State in which it is brought, and a citizen of another State.

Your petitioner states that the personal property to recover the posession of which it brought said action of replevin, much exceeds in value the sum of five hundred dollars, and that your petitioner is a corporation created under the laws of Maryland, and a citizen of said State, and that the defendant, Hamilton, is a citizen of the State of Virginia, and a resident of the Western District of said State.

Your petitioner further says, that it is without any remedy to compel the Circuit Court to exercise the said jurisdiction to hear and try said cause according to the usual and regular forms of procedure in said court, inasmuch as the said order quashing the said writ and service thereof and dismissing the case, is not a judgment to which a writ of error lies.

Therefore your petitioner prays that the said rule may be granted requiring the Hon. Hugh L. Bond and the Hon. Robert W. Hughes, Judges of the Circuit Court of the United States for the Western District of Virginia, to show cause why the said writ of mandamus may not be allowed, the said rule being returnable to such day as your honors may see fit; and your petitioner further prays that a restraining order may be issued forbidding the said defendant Hamilton taking the possession of said property from your petitioner until this petition is heard and determined by this Honorable Court, and for such other relief as may be proper.

JOHN K. COWEN,
Of Counsel for Petitioner.

Robert Garrett being duly sworn according to law, says that he is First Vice-President of the Baltimore and Ohio Railroad Company, the petitioner, and that the facts stated in the aforegoing petition are true to the best of his knowledge and belief.

ROBERT GARRETT.

Sworn to and subscribed in my presence and before me, this 21st day of April, in the year 1883.

SEAL

JOHN WILLIAMS,
Notary Public.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Be it remembered that heretofore, to wit, on the 29th day of March, in the year of our Lord one thousand eight hundred and eighty-three, came the Baltimore and Ohio Railroad Company by its counsel, and sued out of the Clerk's Office of the Circuit Court of the United States for the Western District of Virginia, a writ of replevin against John E. Hamilton, which writ is in the words and figures here following, to wit:

THE UNITED STATES OF AMERICA, WESTERN DISTRICT OF VIRGINIA, TO WIT:

The President of the United States to the Marshal for the Western District of Virginia, Greeting:

Whereas the Baltimore and Ohio Railroad Company, a corporation created and incorporated under the laws of the State of Maryland, and having its principal office in the city of Baltimore and State of Maryland, and a citizen and resident of said State of Maryland, has come into the Circuit Court of the United States for the Western District of Virginia, and found sufficient sureties as well for its clamor to prosecute as for the following property, to wit: Nine freight cars known as single deck freight cars, numbered as follows: 6948, 6985, 6259, 6171, 6856, 6909, 6412, 6577, and 6898; also, four cars known as double deck freight cars, numbered as follows: 7556, 7591, 7513, and 7588: also, six cars known as gondolas, numbered as follows: 5829, 5815, 4075, 2389, 3673, and 4938; also, four cars known as house cars, numbered as follows: 1379, 8851, 10403, 9776, and one iron house car, numbered 17121, levied on at Staunton, Virginia; also five cars known as box cars, numbered as follows: 12321, 8598, 1020, 10935, and 9939; also, one caboose car, numbered 1512; also, two cars known as gondolas, numbered 5211 and 4204; also, one car known as single deck stock car, numbered 6880, and also one car known as a double deck stock car, numbered 7540; also two gondolas, numbered 5585 and 5010;

also, two cars known as box cars, numbered 9639, and 8694; also one gondola numbered 5367, and one locomotive engine and tender numbered 126, levied on at Harrisonburg, Virginia; also two double-deck stock cars numbered 7621 and 7550: also seven cars, known as single-deck stock cars, numbered as follows: 6190, 6276, 6106, 6329, 6034, 6175 and 6258; also two house cars numbered 14083 and 14016; also five cars, known as house cars, numbered as followed: 10658, 11977, 10433, 11524 and 1396; also six cars, known as gondolas, numbered as follows: 3426, 2168, 2204, 3145, 3959 and 2925, and one set of Fairbank's warehouse scales, levied on at Winchester, Virginia, the property of it, the Baltimore and Ohio Railroad Company, which a certain John E. Hamilton, of the county of Augusta in the district aforesaid, hath taken and unjustly detains, as it is said, against sureties and pledges, to be returned if the return thereof shall be adjudged. We therefore command you that the goods and chattels aforesaid, being in your district aforesaid, to the said Baltimore and Ohio Railroad Company, to be replevied and delivered, you cause, and that you summon the said John E. Hamilton that he be and appear before the said United States Circuit Court for the Western District of Virginia, at the courthouse in the town of Harrisonburg and county of Rockingham, in the State of Virginia, and in the district aforesaid, at Rules to be holden in the clerk's office of said court on the first Monday of April next, to answer unto the said Baltimore and Ohio Railroad Company a plea of taking and unjustly detaining the goods and chattels aforesaid, and how you shall execute this writ you make known to us in our Circuit Court for the district aforesaid at the day and place, and have you then and there this writ.

Seal
of
Court

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-ninth day of March, in the year of our Lord, eighteen hundred and eighty-three, and of our independence the 107th year.

W. B. Lurty, *Clerk*.

And at another day, to wit, at Rules holden in the Clerk's office of said Court, on the 4th day of April, 1883, came A. J. Wall, Deputy United States Marshal for the said District, and filed his return upon said writ, together with his receipts for said property, which return to said writ and receipts for said property are in the words and figures here following, to wit:

Executed the within writ by serving a true copy of the within on John E. Hamilton, near his residence, 3 miles east of Staunton, and turning over the property at Staunton. Va., to the Agent of the B. & O. R. R. Co., F. Fowler, March 30th, '83, and taking his receipt for same, which is here returned; also turning over the property at Harrisonburg, Va., to the Agent of the said B. & O. R. R. Co., R. R. Douthat, at Harrisonburg, Va., and taking his receipt for same, which is here returned with writ. Also turning over to the Agent of the B. & O. R. R. Co., at Winchester, Va., G. R. Blake, and taking his receipt for same, which is also here returned.

JOHN G. WATTS,
U. S. Marshal,
per A. J. WALL, *Deputy*.

I, Frederick Fowler, agent of the Baltimore and Ohio Railroad Company at Staunton, do hereby acknowledge that A. J. Wall, Deputy Marshal for the Western District of Virginia, has this day, in pursuance of a writ of replevin, sued out of the United States Court at Harrisonburg, by the Baltimore and Ohio Railroad Company against John Ed. Hamilton, has turned over and delivered to me the following cars claimed by said company in said suit as its property:

1	Flat	B. & O.	5829
1	"	"	5815
1	"	"	4075
1	Stock	"	6948
1	"	"	7556
1	"	"	6985
1	"	"	7591
1	"	"	6259
1	"	"	6171
1	"	"	6856
1	"	"	6909
1	"	"	6412
1	"	"	6577
1	"	"	7513
1	Box	"	1379
1	Stock	"	7588
1	"	"	6898
1	Flat	"	2389
1	"	"	3673
1	Box	B. & O.	8851
1	Flat	"	4938
1	Box	"	10403
1	"	"	9777
1	Iron Car	"	1711

March 30, '83.

F. FOWLER.
Agent B. & O. R. R. Co.
at Staunton, Va.

NOTE.

Here should follow like receipts of Agents at Harrisonburg and Winchester for the property there turned over, but the receipts have been mislaid during the trial of this case, and therefore can not be made a part of this record.

W. B. LURTY, *Clerk.*

And at another day, to wit, at April Rules, 1883, came the Baltimore and Ohio Railroad Company, by its attorneys, and filed their declaration in this cause, which is in the words and figures here following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF VIRGINIA.

Western District of Virginia, to wit:

John E. Hamilton, late of the County of Augusta, in the said Western District of Virginia, and a citizen of Virginia, resident in said Western District of Virginia, was summoned to answer unto the Baltimore and Ohio Railroad Company, a corporation created and incorporated under the laws of the State of Maryland, having its principal office in the city of Baltimore, in said State of Maryland, and a citizen of said State of Maryland, of a plea, whereupon he took the goods and chattels of the said Baltimore and Ohio Railroad Company, and unjustly detains the same against sureties and pledges, and whereupon the said Baltimore and Ohio Railroad Company, by Hugh W. Sheffey, its attorney, complains that the said John E. Hamilton, on the said day of March, in the year eighteen hundred and eighty-three, at and upon a certain railroad called the Valley Railroad, and a certain other line of railroad known as the Winchester and Potomac Railroad, and a certain other line of railroad called the Strasburg and Harrisonburg Railroad; and a certain other line of railroad called the Winchester and Strasburg Railroad, all in the District aforesaid, took the goods and chattels of the said Baltimore and Ohio Railroad Company, to wit: Freight cars numbered 6948, 6985, 6259, 6171, 6856, 6909, 6412, 6577, 6898, known as single-deck stock cars, and numbers 7556, 7591, 7512, 7588, known as double-deck stock cars; numbers 5829, 5815, 4075, 2389, 3673 and 4938, known as gondolas, and numbered 1379, 8851, 10403, 9776, known as box or house cars, and one iron house car 17121, levied on at Staunton, Va.; also box cars Nos. 12321, 8598, 1020, 10935, 9939, caboose car number 1512, gondolas numbered 5211, 4204, single-deck stock car 6880, double-deck stock car 7540, gondolas 5583, 5010, 5367 and box cars numbered 9639 and 8694, also one locomotive engine and tender numbered 126, levied on Harrisonburg, Va.; also double-deck stock cars numbered 7621, 7550, single-deck stock cars 6190, 6276, 6106, 6329, 6034, 6175, 6258, house cars numbered 14083, 14016, also house cars 10658, 11977, 10433, 11524, 1396, gondolas numbered 3426, 2168, 2204, 3145, 3959, 2925, levied on at Winchester, Va.; also one set of Fairbank's warehouse scales, levied on at Winchester, Va., of a large value, to wit: of the value of sixty thousand dollars current money;

then and there found and unjustly detained the same against sureties and pledges until, &c. Whereupon the said Baltimore and Ohio Railroad Company says that it is injured and hath sustained damage to the value of five thousand dollars, and therefore it brings its suit, &c.

SHEFFEY & BUMGARDNER,
And W. B. COMPTON,
Attorneys for Plaintiffs.

The following is the bond filed by the plaintiffs in this cause, and is in the words and figures here following, to wit:

Know all these men by these presents, that we the Baltimore and Ohio Railroad Company as principal, and James Bumgardner, Jr., Charles A. Gladke, and Alexander B. Lightner by Hugh W. Sheffey, their attorney in fact, Hugh W. Sheffey, W. B. Compton, Gilbert S. Meem, and John M. Miller, in the State of Virginia, as sureties, are held and firmly bound unto John E. Hamilton in the full and just sum of seventeen thousand dollars current money, to be paid to the said John E. Hamilton, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made and done, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-bound Baltimore and Ohio Railroad Company is about to issue out of the Circuit Court of the United States for the Western District of Virginia, a writ of replevin, to be directed to the *Marshal* of said district, commanding him to replevy the following goods and chattels, to wit: Freight cars number 6948, 6985, 6259, 6171, 6856, 6909, 6412, 6577, 6898, known as single-deck cars; also, stock cars number 7556, 7591, 7513, 7588, known as double-deck stock cars; also, gondolas number 5829, 5815, 4075, 2389, 3673, and 4938; also, house cars number 1379, 8851, 10403, and 9776, and one iron house car number 17121, levied on at Staunton, Va.; also, box cars, numbered 12321, 8598, 1020, 10935, 9939; caboose number 1512; gondolas number 5211 and 4204; single-deck stock car number 6880, 7540 double-decker; gondolas number 5585, 5010; box cars number 9639, and 8694; gondola number 5367; also, one locomotive engine and tender, number 126, levied on at Harrisonburg, Va.; also, double-deck stock cars number 7621 and 7550, single-deck cars number 6190; also single-deck cars number 6276, 6106, 6329, 6034, 6175 and 6258; also house cars numbered 14083 and 14016; also house cars numbered 10658, 11977, 10433, 11524, 1396; also, gondolas, numbered 3426, 2168, 2204, 3145, 3959, and 2955; also one set of Fairbank's warehouse scales, levied on at Winchester, Va.—all of said cars, house cars, gondolas, single-deck cars, double-deck cars and stock cars, engine and tender being marked B. & O. Railroad—and all of said goods and chattels being the property of the Baltimore and Ohio Railroad Company—the property of the said Baltimore and Ohio Railroad Company which the said John E. Hamilton hath taken and unjustly detains, as it is said, against sureties, and pledges, etc., which said writ is to be returned to the said Circuit Court of the United States for the Western District of Virginia, at the town of Harrisonburg, county of Rockingham, in the District aforesaid, on the first Monday in April, next, at Rules to be holden in the Clerk's Office of said Circuit Court.

Now the condition of the above obligation is such, that if the above bound The Baltimore and Ohio Railroad Company, do and shall well and truly prosecute with effect the said writ of replevin against the said John E. Hamilton for the taking of the said goods and chattels, and shall also well and truly return aud re-deliver said goods and chattels to the said John E. Hamilton if a return thereof shall be adjusted by the said Circuit Court of the United States for the Western District of Virginia, and shall pay and satisfy unto the said John E. Hamilton, his executors, administrators or assigns all such damages, costs and charges as shall be adjudged by the said court, which shall be sustained by occasion of replevying the goods and chattels foresaid, and shall in all things well and truly observe and perform the judgment of the said court in all things in the premises, then the above obligation to be void, else to be and remain in full force and virtue in law.

SEAL
OF
CORPORATION

The Baltimore and Ohio Railroad Company, by
ROBERT GARRETT,
Its *Vice-President.*

Attest:
W. H. IJAMS,
Secretary.

JAMES BUMGARDNER, JR., [SEAL.]
CHARLES A. GLADKE,
ALEXANDER B. LIGHTNER, [SEAL.]

Signed, sealed and delivered in the
presence of by HUGH W. SHEFFEY,
Their *Attorney in fact.*
HUGH W. SHEFFEY, [SEAL.]
W. B. COMPTON, [SEAL.]

Witnesses:
WM. G. KINNEY and
J. C. MURPHY, as to GILBERT S. MEEM, [SEAL.]
E. E. ROGERS and
WM. G. KINNEY as to JNO. M. MILLER, [SEAL.]

This day Wm. B. Compton made oath before me that he is worth the sum of seventeen thousand dollars over and above all his debts and liabilities.

Given under my hand this 29th day of March, 1883.

WM. B. LURTY, *Clerk.*

The following is the Power of Attorney filed with the above bond:

Know all men by these presents, that we, the undersigned, do, and each of us hath named, constituted and appointed, and by these presents do name, constitute and appoint, Hugh W. Sheffey, of the city of Staunton, in the State of Virginia, our true and lawful Attorney for us, and in our names, places and stead, severally to execute, acknowledge and deliver to and before the Clerk of the Circuit Court of the United States for the Western District of Virginia, at Harrisonburg, as sureties for the Baltimore and Ohio Railroad Company, any such replevin or injunction bond or bonds requisite in the law to be executed, acknowledged and delivered by said Baltimore and Ohio Railroad Company in any suit or proceeding instituted, or to be instituted by the said Company, by way of replevin, injunction or otherwise, to release from levy the property of said Company seized for taxes by J. Ed. Hamilton, Treasurer of Augusta County; and all such other writings to make, execute, acknowledge and deliver as may be necessary in the premises, hereby ratifying whatsoever our said Attorney shall or may lawfully do in the premises, by virtue of these presents; and as to any such contract or obligation we authorize our said Attorney to waive the benefit of our homestead exemption.

Sealed with our seals this 26th day of March, 1883.

JAMES BUMGARDNER, Jr., [SEAL.]
C. A. GLADKE, [SEAL.]
A. B. LIGHTNER, [SEAL.]

State of Virginia, Augusta County, to wit:

I, Lewis M. Bumgardner, Notary Public for the County of Augusta, in the State of Virginia, do certify that James Bumgardner, Jr., A. B. Lightner and C. A. Gladke, whose names are signed to the annexed and foregoing writing, bearing date on the 26th day of March, 1883, have acknowledged the same before me, in my county aforesaid. Given under my hand this 26th day of March, 1883.

LEWIS M. BUMGARDNER,
Notary Public.

And at another day, to wit: on the 4th day of April, 1883, came John E. Hamilton, Treasurer of Augusta County and appointee of S. Brown Allen, for the purposes of this levy, &c., by F. S. Blair, Attorney General, and filed with the clerk of said court the following notice in this case, which is in the words and figures here following, to wit:

STAUNTON, VA., March 30th, 1883.

To the Baltimore and Ohio Railroad Co.

TAKE NOTICE:

That on Wednesday, the 3d day of April, 1883, in the town of Harrisonburg, and county of Rockingham, State of Virginia, in the Court room of the United States Circuit and District Court for the Western District of Virginia, I will move the Honorable Judge of that Court to quash and vacate a certain writ issued by W. B. Lurty, Clerk of said Court, at the suit of the Baltimore and Ohio Railroad Company, against me, John E. Hamilton, Treasurer of Augusta county, in replevin, &c., commanding me to deliver to said Baltimore and Ohio Railroad Company the property named in said notice, a copy of which is hereto attached, showing certain property levied on by me for taxes due to the Commonwealth of Virginia from said Baltimore and Ohio Railroad Company—

For the following reasons:

First. Because the said Clerk was not authorized by law to issue such writ against me as such tax collector for the State of Virginia.

Second. Because said Court has no possible jurisdiction of the replevin proceedings named in said writ and said proceedings are null and void.

Third. For other errors to be assigned on the hearing of this motion.

Very respectfully,

JOHN E. HAMILTON,

Treasurer of Augusta County,

And Appointee of S. Brown Allen for the purposes of this levy, &c., by

F. S. BLAIR, *Attorney General.*

State of Virginia, County of Augusta, sct:

I, William A. Burnett, a Notary Public for the County of Augusta, in that the State of Virginia, do hereby certify Joseph A. Waddy personally appeared before and made oath that he did, on the 31st day of March, 1883, deliver to James Bumgardner, Jr., of the firm of Sheffey & Bumgardner, counsel for the Baltimore and Ohio Railroad Company, and also to Frederick Fowler, Agent of the Valley Railroad Company at Staunton, each in person, true copies of the foregoing notice, in the city of Staunton, Va.

{SEAL} Given under my hand and official seal this 31st day of March, 1883.

WILLIAM A. BURNETT, *N. P.*

Notary's fee 25 cents; paid by J. E. Hamilton.

And on the same day, to wit: on the 4th day of April, 1883, at a circuit court of the United States of America for the Western District of Virginia, held at the court house, Harrisonburg, Virginia, came the said Baltimore and Ohio Railroad Company and filed in said court a demurrer to said notice, which demurer is in the words and figures herefollowing, to wit:

IN THE CIRCUIT COURT OF THE U. S. FOR THE WESTERN DISTRICT OF VIRGINIA,

Before Hon. R. W. Hughes, sitting to hear the motion of John E. Hamilton at Harrisonburg.

BALTIMORE AND OHIO RAILROAD COMPANY *against* JOHN E. HAMILTON.	*Upon a motion to quash a writ of replevin sued out by the defendant on the 29th March,* 1883.

This day came the parties, by their attorneys, and the plaintiff in replevin, who is defendent to the motion of John E. Hamilton, treasurer, &c., this day returnable before the Hon. Robert W. Hughes, judge of this court, comes and says that the matters of fact in the said motion averred are not sufficient in law to maintain the relief therein proposed. And for further ground of demurrer, says that the judge of his court hath not jurisdiction of said proceeding by motion, and that said motion is not a proceeding recognized by the laws or practice in the courts of Virginia or in the courts of the United States, sitting in State of Virginia. Wherefore its prays judgment, &c.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
by its Counsel.

And on the same day, to wit: On the 4th day of April, A. D. 1883, the following order was entered in this cause, which is in the words and figures here following, to wit;

BALTIMORE AND OHIO RAILROAD COMPANY vs. JOHN E. HAMILTON, Treasurer of Augusta County, Virginia.	In Replevin.

This day came John E. Hamilton, treasurer, &c., by Hon. F. S. Blair, Attorney-General of Virginia, and Warren S. Lurty, his counsel, and moved the court to quash and abate the writ in this case, and all subsequent proceedings had therein on the motion of the said plaintiffs in said suit, upon the writ and motion of John E. Hamilton, and upon the demurrer filed by the Baltimore and Ohio Railroad Company to said notice.

Whereupon the service of notice to quash and vacate said writ, having been proven, the Court upon argument of counsel for plaintiff and defendent is of the opinion that the said motion should prevail, and doth therefore adjudge and order that said writ be quashed and vacated, and all proceedings subsequent to be no avail, and the Court being of opinion that the property levied by the said John E. Hamilton, treasurer, has not by said writ been taken out of the legal custody of said treasurer, no further order is deemed. necessary to the relation of the custody of said property.

And the Court doth award costs against said Railroad Company, including an attorney's fee of one hundred dollars, and leave is given the said John E. Hamilton to sue out execution for same.

And on the same day, to wit, the 4th day of April, 1883, the following order was entered, which is as follows, to wit:

BALTIMORE AND OHIO RAILROAD COMPANY
against
JOHN. E. HAMILTON.
} In Replevin.

AT RULES.

This cause, which was heard at Rules, at Harrisonburg, on the 4th day of April, 1883, on the motion of John E. Hamilton, Treasurer, to quash the writ, and which after the order therein of April 4th, 1883, entered by Judge Hughes, was adjourned for further consideration upon Judges Bond and Hughes, came this day to be again heard on the proceedings formerly had, and a motion of the defendant, John E. Hamilton, to quash the writ:

Whereupon the courts, both Circuit and District judge sitting, is of opinion and doth order as follows: That the order of Judge Hughes aforesaid be affirmed as entered April 4th, 1883, at Harrisonburg, that the writ of replevin issued in this cause by the clerk was improvidently awarded, and that the same be quashed and vacated as null and void and of no effect, and that this action be dismissed at the costs of the plaintiff, for which execution may issue, &c.

I, Wm. B. Lurty, clerk Circuit Court of the United States for the Western District of Virginia, do certify the foregoing to be a true and correct copy of the record in the replevin suit of the Baltimore and Ohio Railway Company *vs.* John E. Hamilton, lately pending in said court.

In testimony whereof I have hereunto set my hand and affixed the Circuit Court seal this 19th day of April, A. D. 1883, and of our independence the 107th year.

SEAL

WM. B. LURTY,
Clerk U. S. Cir. Court.

16-5-

15 orig

IN THE

Supreme Court of the United States.

EX-PARTE THE BALTIMORE AND OHIO RAILROAD COMPANY.

PETITION FOR A MANDAMUS.

NOTES FILED ON BEHALF OF PETITIONER.

JOHN K. COWEN,
Of Counsel for Petitioner.

THE SUN JOB PRINT, BALT.

IN THE

Supreme Court of the United States.

EX-PARTE THE BALTIMORE AND OHIO RAILROAD COMPANY.

PETITION FOR A MANDAMUS.

This is a petition for a *mandamus* to the Judges of the Circuit Court of the United States for the Western District of Virginia.

The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland, sued out a writ of replevin from that court against John E. Hamilton, a resident of that district. Upon motion of the defendant, the court quashed the writ, on the ground that it had no power to isssue a writ of replevin. Thereupon the plaintiff comes to this court for a mandamus to that court to grant the writ.

The single question raised by this proceeding is, Can the United States Circuit Courts sitting in Virginia issue a writ of replevin?

The statute of 1822-23, chap. 29, of the State of Virginia abolished the writ of replevin in the State courts except in the case of slaves and of chattels distrained for rent. The Code of Virginia of 1860 abolished the writ of replevin altogether, and the Virginia Code of 1873 has adopted the provisions of the Code of 1860 in the following language: "No action of replevin shall be brought, after the commencement of this chapter, except for a cause of action which arose before such commencement, and for which it was capable of being brought at the time the same arose." Code of Virginia, 1873, chap. 145, sec. 4.

By the common law of Virginia and up to the date of the act of 1822-3, the writ of replevin was authorized and used under the laws of that State for the recovery of all chattels wrongfully taken. Vaiden *vs.* Bell, 3 Randolph, 448.

It was so used at the time when the United States Courts were established, and as such it was adopted for those courts by the laws of the United States.

The Circuit Court granted the defendant's motion to quash the writ in the present case, on the ground that the Act of Congress of June 1, 1872, (Rev. Stat., sec. 914) adopted for the United States Courts the law of Virginia abolishing the writ of replevin. The whole question depends on the meaning and effect of sec. 914 of the Revised Statutes. The language of that section is as follows: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This petitioner maintains that this section 914 does not empower the State Legislature to deprive suitors in the Courts of the United States of the remedial right which at common law was enforced by the writ of replevin; that the State Legislature may change the mode of enforcing that remedial right, but cannot take away the right altogether. Section 914 of the Revised Statutes has been passed upon at some length, by this Court, in two cases.

In Nudd et al. *vs.* Burrows, assignee, 91 U. S., 426, the question arose on the Practice Act of Illinois, which provides that the court shall instruct the jury only as to the law, and that the jury shall, on retiring, take the written instructions of the court, and return them with the verdict. At page 441, Mr. Justice Swayne, in delivering the opinion of the court, says: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms and practice were adhered to, in the State Courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the Courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties, while sitting upon the bench, was not complained of. No one objected or sought a remedy in that direction. We see nothing in the act to warrant the conclusion that it was intended to have such an application. If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenched upon. A statute claimed to work this effect must be strictly construed."

Again, in the case of the Indianapolis, etc., R. R. Co. *vs.* Horst, 93 U. S., 299, the same learned judge, speaking for the Court, said: "It is insisted that they (questions of fact submitted by the defendant's counsel) were within the Act of Congress of June 1, 1882, and that hence the Court below erred in declining to require the jury to find in answer to them, in addition to the general verdict. We had occasion to consider this statute in Nudd *vs.* Burrows, 91 U. S., 441, and see no reason to depart from the views then expressed. We said the section in question had its origin in the code enactments of many of the States, and was intended to relieve the legal profession from the burden of studying and of practising under the two distinct and different systems of the law of procedure in the same locality, one obtaining in the Courts of the United States, the other in the Courts of the State; but that it was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common law powers with which in that respect he is clothed. Whether Congress could do the latter was left open to doubt. * * * * * Here the question is one of legislative intent. The intention of the law maker constitutes the law. A thing may be within the letter of a statute, and not within its meaning; and within its meaning, though not within its terms. Where a State law, in force when the act was passed, has abolished the different forms of action and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is undoubtedly obligatory upon the Courts of the States in that locality. There may be other things, not necessary now to be specified, with respect to which it is also binding. But where it prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in their retirement, as in Nudd *vs.* Burrows, or that he shall require the jury to answer special interrogatories in addition to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the Act of Congress, and have no application to the Courts of the United States."

To ascertain the intent and effect of section 914, then, we must look at the changes produced by it in the Federal courts sitting in the code States. In those courts it had no such effect as is claimed for it in the Federal courts of Virginia.

The most radical change wrought by the adoption of codes of civil procedure in the several States is the substitution of one form of action, called the "civil action," for all the common law forms of action. This is a very different change from that worked by the acts of Virginia which abolish the common law form of remedy and substitute no other form.

Mr. Pomeroy, in his work on Remedies and Remedial Rights, section 107, says: "Notwithstanding the sweeping language of the codes and practice acts which abolishes all distinctions between the forms of actions heretofore existing, many judges in construing the provisions have declared in most emphatic terms that the change is confined to the external forms alone of actions at law, and that in their essential features certain distinct and peculiar elements remain which cannot be removed by legislation * * * * If this doctrine, however, is carefully examined and the examples and authorities in its support are closely analyzed, it will be found that all the unchangeable features and elements which are said to inhere in different actions, and which cannot be reduced to an identity, pertain to the primary rights sought to be maintained by their means to the delicts or wrongs by which these rights are invaded, *to the remedial rights which thereupon accrue to the injured party, and to the remedies themselves, which are the final objects of the judicial proceeding.* These features and elements in actions are indeed different, and the difference between them the new system does not propose to abolish or change. The doctrine itself is, therefere, no more than the statement in another form of the conceded facts that the reformed procedure has not affected the primary rights or the remedies which the municipal law creates and confers."

Such was the change wrought in the code States, and such the change contemplated by the 914th section of the Revised Statutes. The Act of June 1, 1872, was not intended to deprive suitors in the Federal courts of any right which was maintained by any form of action at common law, of any remedial right which accrued to the injured party when one of those primary rights was invaded, or of any of the "remedies themselves, which are the final objects of judicial proceeding." If it can be shown that the law of Virginia abolishing the action of replevin without a substitute works any one of these deprivations, then it follows that the Federal courts are not required to conform to that abolition.

On applying the doctrine stated by Mr. Pomeroy, it became necessary for the courts to distinguish and separate the essential elements of the common law forms of action from the mere incidents of form, as the two had never been separated before. The method pursued and the results obtained are set forth by Mr. Pomeroy in his work above quoted in sections 215 *et seq.*, 25, 37 and from 107 to 111. In section 18 replevin is classified as an action *in rem*—vindication—which seeks to recover the very *corpus* of the goods. In section 2 this remedial right to the recovery of the *corpus* is distinguished from the remedial right to the recovery of an equivalent in moneys. In section 25, referring to the convenience of the system as a guide to the petitioners in applying remedies to corresponding remedial rights, the author says: "If the matter in controversy is the ownership of a tract of land or of a specific chattel, and the object of the litigation is to declare such ownership and to recover possession, he knows that ejectment in the one case and replevin in the other *must* be the judicial instrument by which the rights are to be asserted."

The action of replevin maintains directly the primary right in movables. When replevin is extended, as in the United States, to all cases of the unlawful taking of specific chattels, the new remedial right attaches to the ownership of all such property, and bears exactly the same relation to that ownership that the remedial right enforced by ejectment bears to the ownership of lands.

No remedial right is lost under the code system. "Immediately connected with the abolition of all distinction between legal and equitable actions is the abrogation of the common law forms of action. A single civil action sufficient for all purposes requires both of these modifications.

No real difficulty can arise in giving effect to this particular provision of the codes The rights of action remain, and the remedies, which could be recovered by the use of any particular action, may still be secured by means of the civil action which the codes have substituted in the place of all the previous forms; when under given circumstances an injured party might by resorting to some one of the various actions at law have obtained a judgment for land, *or chattels*, or money, he can, under exactly the same circumstances, recover a like judgment by the means which the reformed procedure furnishes to him." Pomeroy Rem. and Rem. Rights, sec. 37.

Enough has been said to show that the right of the owner to the possession of specific chattels taken from him by a trespasser is not a mere incident of form that goes with the abolition of common law forms of action, but that it is one of the essential elements that pass into the new civil action. It relates to the very cause of action itself, and to the unchangeable rights which are to be protected and enforced by the judicial proceeding. If, therefore, the 914th section contemplated only such a change in actions at law in the Federal Courts as was wrought by the codes and practice acts in the State Courts, it did not contemplate such an abolition of a right as will be worked by the adoption of the law of Virginia to govern the Federal Courts in that State.

Neither the language nor the spirit of section 914 of the Revised Statutes will sustain the view that no action can now be brought in U. S. Courts in Virginia to recover the possession of personal property. This section requires that the "pleadings" and "forms and modes of proceeding" in the United States Courts" shall conform as *near as may be*" to the "pleadings" and "forms and modes of proceeding" existing at the time in *like causes* in the State Courts. There must be a "pleading" or "form of proceeding" in the State Court in a "like cause" before this section can operate to require the conformity in the United States Courts. There is no "proceeding" in the Courts of Virginia to enforce the right of possession of personal property. There is no "like cause." That State, as a measure of State policy, has deemed it wise to take away all forms of suits to enforce the recognized right to the possession of chattels. It gives a form of action, or right of suit, to recover damages, but none to recover the corpus. The State does not abolish the right to the possession of personal property, nor the right to recover such possession if the owner is wrongfully deprived of it. The proprietor may still recover such possession if he can do so by the strong hand; but the State does not permit her Courts to afford him a remedy to restore his property or enforce his recognized right to its possession.

Was the object of the 914th section of the Revised Statutes to deprive the United States Courts of the power to enforce rights, when the State had entirely deprived her Courts of the power to enforce such rights? Certainly there is nothing in the language of that section, as construed by this Court, which evinces such an intention. The terms of the section only required the Circuit Court "form or mode of proceeding" to conform as near as may be to the State Court "form or mode of proceeding" "existing at *the time*," in "like causes." But if there is no State Court "form or mode of proceeding," how can there be any conformity? How can the section in such case have any application at all? Its very terms show that there must be an existing "form of proceeding" in the State Court before the statute can operate. There is no such form of proceeding now in Virginia for the recovery of the possession of personal property, therefore the procedure in the United States Court can not conform to a State proceeding that has no existence.

Suppose that Virginia should abolish all forms of action for the recovery of rent and debts due upon sales of property, and, in lieu of the remedy by suit in court, should provide the archaic remedy of distress. Writers upon ancient law inform us that the original method of enforcing obligations of all kinds, was by distress. It is a development of law, growing out of civilization, for the State to authorize a party, deprived of his rights, to first institute a suit in court, or set in motion judicial machinery to secure debts or enforce obligations. If Virginia should choose to go back to the original method, and deprive her courts of the power to entertain suits to recover rent or debts due from sales, does her action take from the United States Courts the power to entertain such suits? Section 629 of the Revised Statutes, provides that the Circuit Courts of the United States shall have original jurisdiction of "all suits" of a civil nature at common law, or in equity, where the matter in dispute, exclusive of costs, "exceeds the sum or value of five hundred dollars, &c."

This section of the Revised Statutes expressly gives the Circuit Courts of the United States jurisdiction of the action of replevin, because it is a suit of "a civil nature at common law."

Section 914 was not designed to abridge this jurisdiction, but only to require the United States Courts in exercising it to conform "as near as may be" to remedial proceedings of the State courts in similar causes; but, of course, when the State authorizes no suit of a civil nature to recover the possession of personal property, the form of proceeding must be that known to the common law. Section 629 confers jurisdiction to enforce the right to recover possession of personal property. Section 914 simply requires the United States Courts to conform their procedure in enforcing that right to State court forms as near as the circumstances of the case will permit; but as there are no forms or modes of procedure in the State courts for that purpose, the United States Courts, in exercising their jurisdiction to secure to an owner the possession of his personal property, must follow the common law forms; i. e., the action of replevin.

If a State were to abolish the action of ejectment to recover real estate, and give no substitute, but leave a party to sue for damages, certainly the Circuit Courts could still enforce the right to the possession of real estate, in accordance with the well-known common law ejectment.

If a state as a measure of State policy, should abolish all actions for assault and battery, and rely alone on Criminal prosecutions to prevent offenses against the person, could not a citizen sue for an injury to his person in the United States Courts? Is any primary *right*, recognized by the common law taken away by section 914? Was that the purpose of the section to take away from the United States Courts, the power to secure common law rights? Should a statute which simply regulates procedure, be construed as taking away from the courts the power to enforce as sacred a right as the right to the possession of a man's own?

If the Legislature of Virginia should abolish all civil actions for negligence, and give only a criminal prosecution on the part of the State against the wrongdoers, would the United States Courts be powerless to afford redress in a civil suit?

We submit that no such consequence can be inferred from the Act of Congress of 1872, which has now become section 914 of the Revised Statutes. The object of that act was not to take from the United States Courts the power to enforce any right recognized by the common law, but only to require the practice of the Federal courts to conform to that of the State courts enforcing that right when the State gave a remedy for such enforcement. The right of the owner to the possession of personal chattels and the right to recover such possession from one who has wrongfully deprived the owner of it, are as old as the common law. These rights constitute part of the collection of rights which we call *property*, and the courts of the United States are organized to enforce them, as well as any other rights which the citizen may have. Congress never intended by a simple *practice* act to strip the Federal courts of the power to enforce the right to the possession of chattels simply because a State deprived her courts of such power.

SECOND.

The Court will observe that one ground set forth in the motion is that the defendant, Hamilton, is a tax collector. But of this no proof was offered, nor could there be on such a motion. Whether or not the defendant was a trespasser in taking the plaintiff's property, or took the same under color of authority, or had any warrant for taking the same for taxes, or whether the taxes were paid, or were not due, or whether the defendant took the plaintiff's property for the taxes of another company, or a dozen other defences, were all proper subjects for plea and issue thereon to be tried by a jury according to due course of law, under the instructions of the Circuit Court. But whether there was or was not a *defence* to the action could only be determined by *trial* and not by motion. The Judges of the Circuit Court were also of this opinion, and no proof of any kind was offered, nor indeed could be offered to sustain the first grounds of the motion, but the learned Judges of the Circuit Court were of opinion that no action of replevin could be maintained in that court, for the reasons herein stated, and hence they refused to hear and decide the case, or to determine upon the validity of the plaintiff's claim, or of any defence which the defendant might have. We respectfully submit that in this they erred, and we ask for a mandamus to compel them to take jurisdiction of this action of replevin.

HUGH L. BOND, JR.,
and JOHN K. COWEN,
Of Counsel for Petitioner.

IN THE

Supreme Court of the U. S.

No. 4, ORIGINALS.

October Term, 1882.

EX PARTE.

In the Matter of the Petition of

THE BALTIMORE & OHIO RAILROAD CO.

BRIEF ON BEHALF OF THE LIBELLANTS.

JOHN H. THOMAS,
G. LEIPER THOMAS,
Attorneys for Libellants.

John Murphy & Co., Printers and Stationers, Baltimore.

In the Supreme Court of the U. S.

No. 4, ORIGINALS.

October Term, 1882.

EX PARTE.

IN THE MATTER OF THE PETITION OF

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF THE LIBELLANTS.

On the 28th April, 1881, Jeanette Maxon, owner of the Barge J. J. Munger, and William M. Force and others, owners of a cargo of corn, which was on board of her at the time of the collision complained of, filed a Libel in the District Court of the United States, for the District of Maryland, against the Baltimore & Ohio Railroad Company, owners, *pro hac vice,* of the Steamer Knickerbocker, to recover for damages done to the owner of said barge and the owners of said cargo, respectively, by a collision between said vessels, caused by the alleged mismanagement and negligence of the servants and agents of said Company. The District Court decreed in favor of the owner of the barge, for

$1,471.20, with interest from the 22d May, 1881, and her costs, and of the owners of the cargo, for $3,907.13, with interest from the same time, and costs. The Circuit Court, on appeal, decreed in favor of the owner of the barge and the owners of the cargo, respectively, for the same sums decreed to them, respectively, by the District Court, with interest from the same date, and all of the costs of suit in both Courts. The defendant prayed an appeal to the Supreme Court of the United States. The libellants resisted it, on the ground that their claims were separate, and that the decree in favor of each set of them was for an amount less than $5,000, and that an appeal to the Supreme Court would not, therefore, lie. The Circuit Judge disallowed the appeal, and passed the following order, assigning his reasons therefor:

"I am of opinion that there is no appeal allowed by statute in this case. The amount which the Railroad is decreed to pay, in the aggregate, is greater than five thousand dollars, but it is owed to separate parties, in different rights, each of whom might have a separate libel, except for the practice of the Admiralty Court. And though the claims of each are united in one libel, the amount in controversy between the Railroad Company and each is not equal to $5,000, and the appeal is disallowed."

The relators filed a petition in this Court for an order on the Judges of the Circuit Court, for the District of Maryland, to show cause why a writ of *mandamus* should not issue, requiring them to allow the appeal. This Court filed an opinion, that the case, as stated by the relators in their application, seemed clearly to come within the principle which had governed its decision in other cases, in which it had held that an appeal would not lie, and quoted, in support of its opinion, the cases which, among others, had brought the Circuit Judge to the same conclusion. It, however, gave the relators permission, if they should think differently, to file a printed brief. They did so; and the Court, afterwards, passed an order requiring the Judges of the Circuit Court of said district to show cause why the mandamus prayed for should not issue. To that order the Circuit Judge has made the following return:

"IN THE SUPREME COURT OF THE U. S.

IN THE MATTER OF THE PETITION OF

THE BALTIMORE & OHIO RAILROAD COMPANY, *Ex parte.*

NO. 4, ORIGINAL FOR OCTOBER TERM, 1882.

To the Honorable the Justices of the
Supreme Court of the United States:

"In obedience to the order of the Supreme Court of the United States, requiring the Judges of the Circuit Court of the United States for the District of Maryland, to show cause why a mandamus should not issue, commanding them to allow an appeal to the Supreme Court of the United States, from the decree in the said order referred to, the Judges of said Circuit Court respectfully shew: That the claim of each Libellant is for damages sustained by each respectively, entirely distinct from those sustained by their co-libellants, for which, but for the practice of the Admiralty Court, each might have filed a separate libel, and insisted upon the right to a separate decree; that the decree is in favor of each, for less than five thousand dollars, not to be paid out of a common fund, on which the claim of either can possibly affect the claim of the other, but to be paid by the Defendant to each, irrespective of the amount decreed in favor of the other. The Supreme Court having, as understood by the undersigned, frequently and invariably, when the point was before it for consideration, decided that an appeal to it would not lie from such a decree, and the law making it their duty either to allow or refuse the appeal, they felt and still feel bound to refuse an appeal, the granting of which could, in their opinion, only result in imposing on that Court the needless trouble of again considering and deciding a question already settled by its previous decisions; and also to save the libellants from the loss to which they would improperly be subjected by granting an appeal under such circumstances.

"The undersigned are, however, as in duty bound, ready to obey any order which the Supreme Court may, in its better judgment, see fit to pass in the premises.

"HUGH L. BOND,
"*Cr. Judge.*"

The claim of the owner of the barge, and that of the owners of the cargo, are not joint, but separate; the owner of the barge might have been entitled to recover; the owners of the cargo not. Their claims have no other connection with each other than that they arise from the same collision, are dependent upon the same general facts, are embraced in the same libel, and the same decree. In such cases, Admiralty Courts, for their own convenience, and to save expense to the litigants, practically compel them to join in one libel. If they file more than one, the Courts will consolidate them. But they do not, because of the litigants so uniting, voluntarily or under compulsion, deprive them of any rights, or subject them to any disadvantages, to which they would not have been, respectively, entitled, or subject, as the case may be, if each had filed their separate libel, and been permitted to prosecute it, alone, without reference to others. If any other effect were given to their thus, voluntarily consulting, as they might have been compelled to do, the convenience of the Courts, the result would be, that the Courts, for their own convenience, compel parties to acquire rights, or become subject to disadvantages, to which they would not be entitled or be subject, if the Court would permit them to prosecute their claims, without reference to its convenience. By compelling one litigant, for the Court's convenience, to unite with another in the assertion of his rights, the Courts have never meant to make the rights of either in any degree dependent on the will of the other, yet such would be the operation of the rule contended for by the relators in this case. If the decree had been against the libellants, the claim of neither of them, alone, would have been sufficient to entitle them to an appeal. One might have wished, and been able to prosecute an appeal. The other might have been unwilling or unable to do so. If either had appealed alone, the amount would have been too small to sustain the jurisdiction, and his appeal would have been dismissed, merely because another libellant, with whom he was compelled, for the convenience of the Court, to associate himself, was unwilling or unable to incur further expense. The operation of the rule would not be impartial. The poor, whose claims are generally small, would be often prevented, by their own poverty, or that of others with whom they were obliged to unite, from carrying the assertion of them farther than the Circuit Court. The rich, whose interests are generally large, could, in the same case, carry the vindication of their rights to the Supreme Court. In this case, the claim of the owner of the barge might have been unassailable; that of the owners of the cargo might have been liable to objection; or *vice versa*. Why should the payment of the one be delayed until the rights of the other can be determined? Why should the rights of the one be treated as, in any degree, dependent on those of the other? Even if both had desired to appeal, the relator could have taken away the right of appeal, from either, by settling with the other. It might have settled with the owner of the barge, for example, who had suffered the smaller, and comparatively insignificant damage, and have left the owners of the cargo, whose damage was larger, and whose claim was equally meritorious, without any remedy. A rule, it is submitted, cannot exist which would render each of the libellants, when successful below, liable to the disastrous delay and expense of an appeal, and which would have given them no corresponding right of appeal, if the decree had been against them. It is not an adequate reply to this argument to say, that the libellants voluntarily subjected themselves to these consequences, by filing one, instead of two libels. They joined in one, as we have before said, under the stringency of a rule which, practically, compelled them to do so. If the relator be right in its contention, and this Court should, on consideration of the merits, determine that one libellant is entitled to recover and another not, the case would be sent back to the Circuit Court, with directions to pass a new decree, in conformity with the opinion of this Court. The result would be, that a libellant who had been altogether right in his contentions, to whom no more than justice had been accorded, would be delayed, ruined, it may be, because, for the Court's convenience, he had been associated with some one else who had claimed something to which he was not entitled. Surely this would not be the administration of justice, as Admiralty Courts boast that they administer it, *velis velatis*. To many a suitor, redress so tardy, would come too late to compensate for suffering which speedier relief might have prevented, or for financial ruin it might have averted. One such victory would be as much as a litigant could stand, unless he had an accumulated capital to support him until a controversy so protracted, might come to an end.

These principles have been so often considered by this Court, and discussed by it so much better than we can hope to discuss them, that we will serve the interest of the libellants by quoting, somewhat at length, the very language of the Justices, in pronouncing its opinions; and we hope we will thus, also, save trouble to the Court, by relieving it of the necessity of looking at the many reports in which that language has been used.

In Shepherd vs. Taylor, 5 Peters, 675, six seamen filed their libel, for mariner's wages, *in personam*, against the owners of the Warren. It appearing that the owners had made an assignment and that their assignees had come into possession of the proceeds of the vessel, the libellants filed a new libel, by way of petition, against the owners and their assignees. The decree was in favor of the libellants, and directed that Commissioners should ascertain how much was due to each of them. On the report of the Commissioners, decrees were rendered in favor of the libellants, for separate amounts, each of them less than $2,000, but amounting, in the aggregate, to more than that sum, which was then the limit of this Court's jurisdiction, on appeal. The assignees appealed, and the libellants made a motion to dismiss. The case was, therefore, very like that now under consideration. The amount in controversy, so far as the appellants were concerned, exceeded that necessary for the jurisdiction. So far as each libellant was concerned, it was less. The case involving the right of appeal is reported as that of Oliver vs. Alexander, 6 Peters, 143. Mr. Justice Story, by whom the opinion of the Court was delivered, after explaining why seamen are allowed to file joint libels for wages, says: "From this summary view of the nature and operation of the proceedings in admiralty in cases of joint libels for wages, it is obvious that the claim of each seaman is distinct and several, and the decree upon each claim is in like manner distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the District Court to the Circuit Court, unless his own claim exceeds $50; nor from the Circuit Court to the Supreme Court, unless his claim exceeds $2,000. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute."

In the case of Rich against Lambert, 12 H., 347, five of the separate owners of cargo joined in one libel against the ship Martha, for damage done to their goods, in the course of the voyage. Other owners of cargo filed separate libels against her for the same purpose. By order of the Court all of the cases were consolidated. A decree was entered, adjudging to each of the fifteen several owners the amount of the loss they had respectively sustained, from which the defendants appealed. With the exception of two of the owners the sum decreed against the respondents was below the amount which authorized an appeal to this Court. Objection was taken to the jurisdiction of this Court, on the part of those in favor of whom, respectively, the decree had been for less than $2,000; and it was contended, on behalf of the appellants, that the objection was not available, because the aggregate amount decreed to them exceeded $2,000. The objection was sustained, and the appeal, as against the appellees who made the objection, was dismissed. Mr. Justice Nelson, by whom the opinion was delivered, used the following language: "The joining of several owners of cargo conveyed in the same ship, in a libel *in rem,* for damages done to the goods in the course of shipment, and the consolidation of libels filed separately for the respective owners for like damage, is allowed by the practice of the Court, for its convenience and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted, without complicating too much the proceedings, and thereby prejudicing the rights of the parties. In cases where the several claims against the ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel or by an order for consolidation, if separate suits have been instituted. The defense will usually be the same in all the cases, but if otherwise, the parties will not be prejudiced, as they may avail themselves in the answers of any defense existing against either of the several owners. For although the proceeding assumes the form of a joint suit, it is, in reality, a mere joinder of distinct causes of action, by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits. We do not perceive, therefore, any ground for a distinction as to the right of appeal, from a decree as entered in these cases, from that which exists where the proceedings have been distinct and separate throughout. Clearly a libellant could not have appeal, unless his claim exceed $2,000. Nor can the respondent, upon the same principle, unless the amount decreed against him, in the particular case, exceeds that sum. The principle, in effect, we think, has been already decided in this Court. 6 Pet. 143, 8 Ibid., 11 How., 522."

To the counsel for the libellants this decision seems conclusively to settle the points now under consideration, and the reasoning and language of the Court to be as appropriate to this case as if they had been employed expressly in it.

The claims of the libellants in the case now under consideration are not, nor is the decree in their favor, against any limited fund, out of which they are all to be paid. They are against the defendant personally. The success of the one libellant can not diminish, nor can his failure increase, the amount to be realized by his associates. There is, therefore, no common fund over which the parties are litigating, which might, under other circumstances, be considered the subject of controversy between them, and the amount of which might determine the right of appeal. Even in a case involving such a controversy, this Court has often determined that, if the demand of each claimant be separate, and not joint with that of any other, the right of appeal, as to each, depends on the amount decreed in his favor, not on the aggregate amount decreed in favor of them all.

In Seever vs. Bigelows, 5 Wall., 208, Seever filed a creditor's bill seeking satisfaction, from a fund exceeding $2,000, in the hands of one of the defendants. Upon the question of jurisdiction, Mr. Justice Nelson, in delivering the opinion of this Court, says: "The judgment creditors who have joined in this bill, have separate and distinct interests, dependent upon separate and distinct judgments.

In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than $2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each. It is true, the litigation involves a common fund which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the Court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law. The case is analagous to proceedings in admiralty in behalf of seamen for wages, and salvors for salvage, where the practice of the Court is well settled. In the case of the seamen, though the contract is separate and not joint, all may join in the libel and carry on the proceedings in form, jointly, to the decree, which assigns to each, severally, the amount due. If the sum thus assigned is under $2,000, neither party can appeal. So in respect to the case of salvage, where the amount charged upon the goods of each of the several claimants is less than this sum. The case of Rich vs. Lambert furnishes another illustration. There, several owners of cargo, having separate and distinct interests, filed a libel against a vessel for damage done to the goods on the voyage. The Court decreed damages in their favor, but with the exception of two of the cases the amount was under $2,000. The Court dismissed the appeals for want of jurisdiction. The only plausible ground upon which the jurisdiction can be sustained in the case before us is, that the several judgment creditors are proceeding against a common fund which each is interested to have applied to the payment of his demand. But the same ground for the jurisdiction existed in the case of the seaman, salvors, and owners of cargo for damages. The answer is that the interest of the judgment creditors in the common fund could not exceed the amount of their several and separate judgments, and as these are under the $2,000, the same reason exists for cutting off the appeal as if the suit had been separate and not joint."

In the case of Paving Company vs. Mulford, 100 U. S., 147, the following language is used by Mr. Chief Justice Waite: "A suit in equity was brought by the Ballard Paving Company against Michael Mulford and sundry persons, who claimed to have purchased from him certain certificates of the Auditor of the Board of Public Works of the District of Columbia, which it was alleged were the property of the Company. Mulford and Campbell, the appellees, were two of the defendants, but they were proceeded against as holders of separate and distinct certificates. Their liability as set forth in the Bill was several only. There was no pretence of a joint obligation, and it is conceded that in no event could there be a recovery against either of them separately for more than $2,000. On the hearing, the bill was dismissed as to these defendants, and the Paving Company has appealed.

"We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into the suit, the proceeding is, in fact, against each of the several purchasers to enforce his separate and distinct liability. It is a joinder of distinct causes of action, against distinct parties. The same decree is to be entered against each, as in case of separate suits. The recovery, if any, must be against each defendant separately, for the amount he may be found separately accountable. Such being the case, the value of the matter in dispute with each defendant must be the same for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on appeal. Seever vs. Bigelows, 5 Wall., 208; Rich vs. Lambert, 12 How., 347; Oliver vs. Alexander, 6 Pet., 143; Stratton vs. Jarvis, 8 Ibid., 41. In such cases the appeal of each separate defendant or complainant must stand or fall, according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction."

In the case of Russell vs. Stonesell, decided on 13th March, 1882, and reported in 4 Morrison's Transcript, 221, Stonesell, the appellee, had obtained a decree against the Levee Board for $71,623.67. In pursuance of authority given him by the statute creating the board, he instituted proceedings to obtain an assessment and collection of the charge imposed on the bonds in the District, for payment of the decree. Russell and others, as individuals, and as members of an executive committee, which had been appointed at a mass meeting of the owners of the bonds charged with the payment, filed a bill, asking for an injunction to restrain the collection of the assessments which had been made. The amounts with which the complainant's were respectively charged were all less than $5,000; but the aggregate of them all exceeded that sum. This Court decided that it had no jurisdiction, on appeal; and Mr. Chief Justice Waite, in announcing the decision, says: "While the appellants and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts against them. There is no joint responsibility resting on them as a body. The proceeding on the part of the appellee was to require of the several owners in the levee district to pay their separate shares of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances, of which complaint was made, their object was to relieve each separate owner from the amount for which he personally or his property was found to be accountable. An injunction, if granted, would necessarily be, to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in Paving Company vs. Mulford, 100 U. S., 148; Seever vs. Bigelows, 5 Wall., 208; Rich vs. Lambert, 12 H., 247; Stratton vs. Jarvis, 8 Pet., 81; and Oliver vs. Alexander, 6 Pet., 143, such distinct and separate interests can not be united for the purpose of making up the amount necessary to give jurisdiction, on appeal. Although the amount due the appellee for the levee district exceeds five thousand dollars, his claim on the several owners of property is only for the sum assessed against them separately. Any owner can relieve himself and his property from all further liability for the district by paying his part of the assessment."

If an appeal by the complainants would not lie, one against them would not. The right, if it exist, must be reciprocal.

In the case of Chatfield vs. Boyce, decided 6th March, 1882, and reported in 4 Morrison's Transcript, 81, certain creditors who were secured by an assignment, brought a suit on behalf of themselves, and of all other creditors who were secured thereby, to set aside a prior assignment covering the same property. The decision having been adverse to them, they appealed. This Court decided that the matter in dispute as to the complainants, was the particular share of each in the fund which might be realized—not the aggregate of these shares, nor the amount of the entire fund and that as no one complainant could realize as much as $5,000 no appeal would lie. Mr. Chief Justice Waite, in delivering the opinion, says: "The fund is $6,354.91, and the debts entitled to the benefit of the assignment, $17,233.63, of which the complainants represent only $9,672.43. Under this state of facts the whole of the distributive shares of the complainants, if they are successful, will be less than $5,000, not enough to give us jurisdiction."

It is respectfully submitted that those of the above mentioned decisions which relate to appeals in admiralty proceedings, clearly establish the proposition for which the libellants contend—that no right of appeal exists in this case. Those which involve the right of appeal in equity proceedings seem to us to go even further than is necessary for our purpose. In them, each complainant voluntarily associated himself with his co-complainants. The libellants in this case were practically compelled to join in the same libel. If they had filed separate ones, the Court would have consolidated them. ^In the equity cases the complainants were seeking to recover one fund, to be divided between them, in proportion to their respective claims. The defendants were seeking to retain it all for themselves. In this case, each libellant prosecutes for himself alone, his own claim against the defendant. It is immaterial to each whether his associate succeeds or fails. The success of one will not diminish, his failure will not increase the dividend coming to his associates. Each, if his claim be good, is entitled to the whole of it, whether the claim of his associate be good or bad.

The policy of the law is to require joint libels to be filed, instead of separate ones, when compatible with the attainment of justice. U. S. Revised Statutes Sects. 977 and 978. Rule 16 of the District Court of U.S. for the District of Maryland.

It is respectfully submitted that this Court did not intend to modify any of the principles established by these decisions, or logically deducible from them, by its decision in the case of Parcher vs. Cuddy, which is strongly relied on by the counsel for the relators. The short opinion in that case is delivered by Mr. Chief Justice Waite, who had very recently before delivered several of the opinions hereinbefore quoted, and who afterwards delivered the opinion in the case of Russell vs. Stonesell. The case of Parcher vs. Cuddy, it is respectfully submitted, differs from that now under consideration as clearly and conspicuously as it differs from any of those we have hereinbefore referred to and relied on. In that case thirteen separate suits had been instituted in the State Courts of Michigan, the plaintiff in each claiming five thousand dollars, the aggregate of all their claims amounting to sixty-five thousand dollars, against the owner of the steam pleasure Yacht Mamie, to recover damages resulting from her alleged mismanagement, in which the defendant had not participated. The Act of Congress, sections 4283, &c., Revised Statutes, exempts the owner of any vessel from liability for damages beyond the value of his interest in the vessel, if the matter or thing from which the damage arises occurred without his privity or knowledge; and it authorizes him to take appropriate proceedings for the purpose of procuring the benefit of that exemption. The owner, the defendant in those suits, instituted such a proceeding, in the District Court; and, as an incident to it, asked to have the plaintiffs restrained from prosecuting their claims against him, personally, for more. The plaintiffs replied that the yacht was intended and used only for pleasure, not for the purposes of commerce; that she did not come within the purview of this statute, and that the owner, therefore, was not entitled to the limitation he claimed, or the relief he sought. The case, involving these points solely, was brought, by appeal, to this Court, and the motion was here made to dismiss the appeal, on the ground that no one of the claims exceeded five thousand dollars.

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To obtain the benefit of the exemption, by appropriate proceedings, the owner must, as he did in that case, implead the world. He asked for a special injunction against those only who were specially molesting him. But the whole world was bound by the proceeding; each individual as much so as if he had been made technically a party to it. If any other new person had molested the owner, it would not have been necessary to file a new libel for the purpose of making such person a party. It would only have been necessary to file a petition, alleging the fact, and asking for the special relief required. On such petition, the Court would restrain him; not because he was technically a party to the proceeding, but because it was one by which all the world was bound. If the act be not susceptible of this application, it is, in most cases, nugatory and valueless; at all events, the rights of a poor litigant under it could scarcely ever be got by him to this Court for adjudication. In that case the controversy, practically, was between the owner of the yacht, all of the plaintiffs, collectively, and the rest of the world, if any one else had a claim arising from the same disaster. If any one of the plaintiffs should recover as much as his claim, it would be more than the value of the defendant's yacht. If his contention as to the law was right, it would, in that event, be immaterial to him whether the others should recover or not. Their recovery would not increase the amount of his liability; it would only increase the number of those who would share in the fruit of it, and be entitled to have the amount divided, *pro rata*, among them. The single question which came to this Court for decision, was whether the owner's liability was limited or unlimited, a question in which the plaintiffs were all jointly interested on one side, and he, alone, was interested on the other. In the case now under consideration, the owner of the barge may be found to have a perfectly clear claim, and the owners of the cargo may have none, or *vice versa.* The appeal claimed in this case involves not only the question whether the collision was caused by the fault of persons for whose default the relator is responsible, a question in which all of the libellants are interested, but it involves the further question, whether each set of libellants is entitled to the amount of damages decreed to them, respectively. The question in which all of the libellants are interested might be decided in their favor. The other questions, in which they have no common interest, might be decided in favor of one set of libellants and against the other.

It is no reply for the counsel of the relators to say, that they only intend to discuss the question of liability, in which all the libellants are interested, not any question of damages in which some may be interested and others not. The right of appeal depends upon the questions which the record involves; upon those which *may be*, not alone on those which any one says *will be* raised. It cannot be in the relator's power to acquire a right of appeal, by imposing on itself a limitation as to the points it will raise, or the subjects it will discuss.

The fact that the two claims are embraced in the same decree, it is submitted, do not affect the right of appeal. This was done for the Court's convenience; for the same reasons that led to the adoption of the practice requiring them to be embraced in the same libel. If they were separate, not joint, before the institution of proceedings, before the passage of the decree, they are still separate, not joint. This, as has been shown by the authorities before referred to, is the criterion for determining whether they are to be considered separately, or in the aggregate, for the purpose of determining whether or not the amount in controversy is sufficient for an appeal to this Court. If the libellants, having separate claims, were entitled to separate decrees, from which an appeal would not lie, their claims remain separate, not joint, notwithstanding the fact that the Court has, for its own convenience, embraced them in the same decree. It cannot be discretionary with a subordinate Court to give or take away, a right of appeal, at its pleasure, by adopting one form or another in its administration of relief. In the case of Rich vs. Lambert, which, as we before said, seems to us decisive of this, the libels were all consolidated, and there was but one decree. The Court, nevertheless, decided that the right of appeal, as against each libellant, depended on the amount decreed to him, not on the aggregate of the amounts decreed to them all.

JOHN H. THOMAS,
G. LEIPER THOMAS,
Attorneys for Libellants.